IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. _____

LEE A. GIFFORD and CHARLES R. SAMUELS,
Petitioners,

---

v.

JESSE L. ALLEN and CONSTANCE G. ALLEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FOURTH CIRCUIT

Lee A. Gifford and Charles R. Samuels respectfully pray that a writ of certiorari be issued to review an order of the United States Court of Appeals for the Fourth Circuit entered June 21, 1972, hereinafter described.

OPINIONS BELOW

The opinion of the Court of Appeals has not, as of the date hereof, been reported. A copy is reprinted in the Appendix hereto annexed.

The opinion of the District Judge is not reported. The opinion is copied in the Appendix.

The opinion in a companion case by the United States Court of Appeals for the Fourth Circuit styled "Charles A. L. Almond, Appellant, v. John E. Kent, etc., et als, Appellees, has not been reported as of this date, and is copied in the Appendix.

JURISDICTION

The date of the judgment of the Court of Appeals is June 21, 1972, and the same was entered on said date. The order reversed the decree of the United States District Court for the Eastern District of Virginia by vacating the judgment order of the District Court which latter order sustained the petitioners' pleas of the Statute of Limitations and dismissed the action brought by respondents in the District Court. The Court of Appeals also remanded the case to the District Court for further proceedings consistent with its opinion.

The jurisdiction of this Court is invoked

under 28 U.S. Code § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented are as follows:

1. Did the Circuit Court err in its ruling that a complaint charging racial discrimination in the sale of real estate in violation of 42 U.S.C. § 1982 was barred by Virginia two-year statute of limitations instead of the one-year statute of limitations prescribed by Vol. 2, Michie's Code of Virginia 1950, § 8-24, in view of the fact that the Supreme Court of Appeals of Virginia has consistently ruled that in cases not involving personal injuries, which do not survive at common law, the one-year statute of limitations applies?

2. Did the Court err in not following the holding of this Honorable Court in Iron Gate Bank v. Brady, 184 U.S. 665, 22 Supreme Court 529, 46 L. Ed. 739?

3. Whether or not the Fourth Circuit erred in concluding that where the same act constitutes both a state tort and the deprivation of a constitutional right, the deprivation of the constitutional right justifies the arbitrary selection of "the two-year step in Virginia's statute of limitations scale of values," in view of the fact that the Civil Rights Act upon which this proceeding is based provides no statute of limitations and all of the Circuit courts deciding similar and identical questions have heretofore ruled, without exception, that in such cases the Federal courts must look to the period of limitations which a court of the state in which the Federal court is located would apply, had an action seeking similar relief

been brought in that forum (certiorari having been consistently denied by this Honorable Court in all appeals where the state court would rule that a similar action would be barred).

4. In an action brought under the Civil Rights Act under Title 42 U.S.C.A. § 1982, where the complaint is founded on damage for refusal to sell a person a home because of his race, resulting in damages claimed for being offended, humiliated, embarrassed and degraded, and based upon emotional stress and anxiety resulting therefrom, is the action a claim based upon physical injuries, justifying the application of Virginia's two-year statute of limitations, or are these claimed damages consequential damages covered by the one-year statute of limitations prescribed by Virginia law?

STATUTORY PROVISIONS INVOLVED IN THIS CASE

(1.) Vol. 2, page 30, Michie's Code of Virginia, as Amended, Title 8, § 8-24, provided as follows:

"§ 8-24. Of actions not before specified.--Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and if it be for a matter not of such nature, shall be

brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four. (Code 1919, § 5818; 1954, c. 589.)

(2.) Title 42 U.S.C.A. § 1982. Property rights of citizens. "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." P. 193.

STATEMENT OF THE CASE

Federal jurisdiction in the District Court is based upon Title 42 U.S.C. § 1331 and § 1343 (4) and principally under Title 42 U.S.C. § 1982.

On August 31, 1971, respondents filed a complaint in the United States District Court for the Eastern District of Virginia at its Norfolk Division against petitioners, alleging that the petitioner Lee A. Gifford was engaged in the business of developing, building and selling a tract of housing accommodations known as "Georgetown Colony" in the City of Chesapeake, Virginia, and further alleging that the petitioner Charles R. Samuels was engaged in the real estate business and acting both in an individual capacity and as broker and salesman for the petitioner Gifford. Respondents further alleged that on or about September 12, 1969 and thereafter, petitioners offered for sale to the public, housing accommodations in said subdivision;

that they are members of the Negro race and that on or about September 12, 1969, they were ready, willing and able to purchase housing accommodations in said tract and offered to purchase a dwelling therein, which offer was refused on the basis of respondents' terms and conditions. The respondents further alleged that on or about September 18, 1969, they again offered to purchase said dwelling on the terms and conditions of petitioners, which offer was refused by the petitioner Samuels, who informed respondents' Agent that the particular parcel had been sold to another buyer, which "buyer' was petitioner Gifford.

Respondents next alleged that on September 24, 1969, they offered to purchase the dwelling from petitioner Gifford, which offer they alleged was refused solely because of respondents' race. They admit in their complaint, filed in the District Court, that Gifford eventually contracted to sell them said dwelling, on or about November 26, 1971, and they charge Gifford and Samuels with malicious and intentional illegal actions which "offended, humiliated, embarrassed and tended to degrade" each of the respondents, causing them each great emotional stress and anxiety. In conclusion, they prayed that the Court award Jesse Allen $25,000.00 in compensatory damages and $10,000.00 as punitive damages, and to Constance Allen, the sum of $25,000.00 compensatory damages and $10,000.00 as punitive damages.

The District Court, whose opinion is set out in the Appendix, in its opinion cited Ellenburg v. Shepherd, 304 F.Supp. 1059 (E.D. Tenn. 1966) affirmed 406 F.2d 1331 (6th Cir.

1968), certiorari denied 393 U.S. 1087 (1969), as well as the decision of two other district judges in the Eastern District of Virginia and the Western District of Virginia, similarly holding that the one-year statute of limitations applies.

In a companion case of Almond v. Kent, 321 F.Supp. 1225, 1228 (W.D. Va. 1970), Judge Dalton held that the one-year statute applies not only to purely personal actions but also to personal injury acts when they are claimed under the Civil Rights Act. This case was reversed by the Fourth Circuit and is reported in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue in this case because the Fourth Circuit has rendered a decision in conflict with the decision of other circuits. Other circuits have ruled that the Civil Rights chapter under which this action was brought contains no statute of limitations of its own, governing Civil Rights acts and that the Federal Court will look to the period of limitations which a court of the state in which the Federal Court is located would apply had action seeking a similar relief been brought in that forum. A host of circuit court cases are set out in the supplemental footnote to Title 42 U.S.C. § 1983, at page 388, note No. 402, the cases there being too numerous to be set out in this petition.

In addition, the Fourth Circuit in the case at bar has decided a Federal constitutional case in a way in conflict with an applicable decision of this Court. This Honorable Court, in Iron

Gate Bank v. Brady, 184 U.S. 665, 22 Supreme Court 529, 46 L.Ed. 739, dealt with the statutes of Virginia in connection with a tort involving an averment of malicious and wanton conduct arising out of a claim against a Federal official for maliciously and wantonly damaging of a plaintiff in the service of a distress warrant. This Honorable Court held that such a tort does not, either at common law or by the Statutes of Virginia, survive the death of the wrongdoer.

Punitive damages, where the right of action does not survive, have never been held to survive the parties entitled thereto. 25 C.J.S. Damages § 124, page 731.

The Fourth Circuit further ruled on July 29, 1970, in the case of Griggs v. Farmer, 430 F.2d 638, that the prevailing statute of limitations was one year for breach of promise to marry -- two years for the assault. For the breach of promise, the damages asserted were mental anguish, humiliation, impairment of health, and expenses in anticipation of the wedding and the establishment of a home as well as deprivation of other opportunities to marry. In disposing of this case, the Fourth Circuit had this to say: "There was no proof adduced nor authority noted establishing that these items constitute special damages envisioned by the Virginia doctrine." The action of the District Court in dismissing the two causes, one for breach of promise, the other for assault, was affirmed.

We are at a loss to understand how the Fourth Circuit Court holds that mental anguish, humiliation, impairment of health, and the

remaining damages claimed were barred by the one-year statute in Griggs v. Farmer, and on the other hand, less than two years later, to hold that because a constitutional issue was involved, the two-year statute should apply to cases involving claims for mental anguish and humiliation and general emotional damages.

The writ should be granted for yet another reason. Virginia has held consistently that actions for consequential damages, such as claims arising out of emotional hurt, are barred after one year, since they do not survive the death of the injured party. Grubb v. Sult, 73 Va. (32 Gratt) 203; Lee v. Hill, 87 Va. 497, 125 E. 1052, Winston v. Gordon, 115 Va. 899, 80 S.E. 756; Mumpower v. City of Bristol, 94 Va. 737, 27 S.E. 581.

A writ should be granted for the case at bar for an additional reason, that § 8-24 of Michie's Code of Virginia, hereinbefore referred to, distinguishes between a physical injury and other injuries. Physical injuries are limited to two years; other injuries are limited to one year. Emotional damages are not personal or physical injuries as this Honorable Court has decided in the Iron Gate Bank case, supra.

The Fourth Circuit failed to follow the rulings of the Virginia Supreme Court as to its holdings that in similar cases involving consequential damages the one-year statute of limitations applies.

In Cover v. Critcher, 130 S.E. 238, 143 Va. 357, 364, the Court held that "the damage must be direct and not the consequential injury

or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away, no part of it was wasted or destroyed; the plaintiff's use of his property and not the property itself, was affected by the act of which he complains. We are of the opinion that such a right of action did not survive and that it is barred by the limitation of one year."

In Cover v. Critcher, supra, the Virginia Supreme Court of Appeals cited Henshaw v. Miller, 17 Howard (U.S.) 212, 15 L.Ed. 222, wherein this Honorable Court construed the statute of limitations of Virginia and after holding that it does not govern torts generally, this Honorable Court had this to say: "and much less can it be made to cover an indirect and consequential injury to the welfare or property of defendant resulting from fraud practised upon him."

The decision in the case at bar by the Fourth Circuit was based upon what it considered was a companion case, styled "Almond v. Kent", set out in the Appendix. That case is not in point since it was based upon a complaint under Title 42 U.S.C. § 1983 for deprivation of civil rights against the sheriff of Augusta County and the Augusta County Division of Virginia State Police. In that case the complaint alleged that the Virginia State Police unreasonably beat the plaintiff with resulting physical injuries. We admit that if the petitioners had committed a physical assault upon the respondents, that the two-year statute of limitations would apply, but we earnestly contend that the one-year statute of limitations applies to all cases brought for

emotional hurt, whether the cases involve a denial of constitutional right or violate some other duty owed to the complainant.

CONCLUSION

It is respectfully submitted that this case was correctly decided in the District Court and that the Court of Appeals has disregarded similar rulings by this Honorable Court involving an interpretation of the Virginia statute of limitations; that it violated its own previous ruling in a similar case involving emotional damages; and in addition it, by its ruling, in the case at bar, did violence to the universal rule of other circuits that the statute of limitations of the forum should govern; and finally, it failed to follow the interpretation which the state of Virginia has placed upon its own statute of limitations which govern this case.

The writ of certiorari should be awarded.

Respectfully submitted,

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Gordon E. Campbell, of Counsel for Charles R. Samuels

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We, the undersigned, attorneys for the petitioners, do hereby certify that we have served three copies of this petition on each other party separately represented in this proceeding by depositing the same in a United States Post Office or mail box, with first class postage prepaid, addressed to each counsel of record, at his Post Office address, to-wit:

Stanley E. Sacks, Esquire
Filmore E. Rose, Esquire
Sacks, Sacks & Tavss
First & Merchants Bank Building
Norfolk, Virginia 23510

All parties required to be served have been served this 12th day of July, 1972.

By Norris E. Halpern
Norris E. Halpern, Counsel
for Lee A. Gifford

By Gordon E. Campbell
Of Counsel for Charles R.
Samuels

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

JESSE L. ALLEN	:	
and	:	
CONSTANCE G. ALLEN,	:	
Plaintiffs	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 497-71-N
LEE A. GIFFORD	:	
and	:	
CHARLES R. SAMUELS,	:	
Defendants	:	

MEMORANDUM OPINION

The plaintiffs, Negro residents of Virginia, seek damages under the Civil Rights Act of 1866, 42 U.S.C. § 1982, for humiliation and emotional distress allegedly caused by the defendants' wrongful refusal to sell them a house solely because of their race. The plaintiffs eventually acquired a house from the defendants but they assert that they still have a claim for the humiliation and emotional distress involved in the initial refusal to sell. The plaintiffs claim no physical injuries.

The matter is before the court on the defendants' motion to dismiss because the action was not timely brought. The Civil Rights Acts contain no statute of limitations but all parties agree (and it is the law) that such being the case, the most analogous Virginia statute of limitations should apply. Ellenburg v. Shepherd, 304 F.Supp. 1059 (E.D. Tenn. 1966), aff'd., 406 F.2d 1331 (6th Cir. 1968), cert. denied 393 U.S. 1087 (1969), McIver v. Russell, 264 F.Supp. 22 (D. Md. 1967). The parties also agree that the applicable Virginia statute is Va.Code Ann., § 8-24 (1957 Repl. Vol.). The parties, however, disagree on which provision of the statute should be applied on the facts of the case. The plaintiffs contend that the two year personal injury limitations should govern. Defendants contend that the claim is barred by the one year limitation period of personal actions which do not survive. Va. Code Ann., § 8-24 (1957 Repl. Vol.).

The gravamen of the plaintiffs' action is solely the damage to their feelings since no physical injury was alleged. In Virginia the most analogous actions involving mental distress would be those for malicious prosecution, false imprisonment, libel and slander. All of these actions are personal to the plaintiffs -- they do not come under the special two year statute of limitations for personal injuries. 12 Michie's Jur. Malicious Prosecution § 32 (1950); 12 Michie's Jur. Limitation of Actions § 19 (1950); 12 Michie's Jur. Libel and Slander § 45 (1950; 1 C.J.S. Abatement and Revival § 132 (1936).

In the unreported case of Compton v. Rosser, Civil Action No. 112-70-NN (E.D. Va. March 11, 1971), Judge Richard B. Kellam, of this court, dealt with a similar problem and after a thorough discussion, reached the same conclusion, i.e., that the one year statute of limitations was applicable in an action alleging conspiracy under the Civil Rights Act. In Compton Judge Kellam cites Griggs v. Farmer, 314 F.Supp. 1185 (E.D. Va. 1960), aff'd., 430 F.2d 638 (4th Cir. 1970) in which it was held that the normal one year statute of limitations for a breach of promise action was not extended by alleging damages for humiliation and mental anguish.

In Almond v. Kent, 321 F.Supp. 1225 (W. D. Va. 1970), Chief Judge Ted Dalton, citing McIver v. Russell, 264 F.Supp. 22 (D. Md. 1967), held that actions under the Civil Rights Acts should be governed by the same statute of limitations and ". . . should not vary according to the particular facts alleged." Almond v. Kent, 321 F.Supp. 1225, 1228 (W.D. Va. 1970). Judge Dalton went so far as to say that the one year

statute applies not only to purely personal actions but also to personal injury actions when they are claimed under the Civil Rights Act.

This court need not go that far in order to hold that the one year statute applies. Since the actions complained of occurred more than one year before the suit was filed and such actions gave rise only to a personal action by the plaintiffs, the defendants' pleas of the statute of limitations is sustained and the case is DISMISSED.

(s) John A. MacKenzie
United States District Judge

Norfolk, Virginia

January 6, 1972, Date of Entry

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1160

Charles A. L. Almond,

Appellant,

versus

John E. Kent, Sheriff of Augusta County, Virginia, Virginia State Police, Augusta County Division, Sergeant R. C. Gaunce, Trooper I. B. Davis and Trooper Manley Brown,

Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg.
Ted Dalton, Chief Judge.

(Argued February 8, 1972 Decided April 10, 1972)

Before WINTER and BUTZNER, Circuit Judges, and CHAPMAN, District Judge

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WINTER, Circuit Judge:

Charles A. L. Almond, a prisoner incarcerated under state process, filed suit on July 15, 1969, under 42 U.S.C.A. §1983 for deprivation of civil rights against John E. Kent, Sheriff of Augusta County, and the Augusta County Division of the Virginia State Police. Almond alleged that on, or about November 12, 1967, (1) the Virginia State Police unreasonably beat him with resulting physical injuries, (2) his shoes were taken from him at the Augusta County Jail, (3) he was placed in "isolation" and was denied visits from his wife and family, and (4) the $50,000.00 bail set for him was excessive. By a later pleading, Sergeant Gaunce and Troopers Davis and Brown of the Virginia State Police were added as defendants.

The district court dismissed the complaint on the ground that plaintiff had not sued by committee in accordance with Virginia law, made applicable to the district court by Rule 17(b), F.R.Civ.P., and that as to Gaunce, Davis and Brown, who raised the issue, suit was barred by the Virginia statute of limitations since it was not brought within one year after the happening of the events complained of. As to the defendant Kent, the district court also decided that no cause of action under the Act had been alleged against him.[1] We disagree with regard to

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1. The district court also ruled that "Augusta County Division, Virginia State Police" is not suable under § 1983. See Monroe v. Pape, 365 U.S. 167 (1961). This holding is not challenged on appeal.

plaintiff's incapacity to sue in his own right, and with regard to the applicable period of limitations, and so we remand for further proceedings. While the allegations concerning Sheriff Kent may or may not state a cause of action, we think that on remand plaintiff, with the aid of counsel to be appointed to represent him, should be afforded the opportunity to amend his allegations with respect to Sheriff Kent, as well as to restate and sharpen his allegations with regard to the other defendants.

- I -

Rule 17(b), F.R.Civ.P., provides that the capacity of an individual to sue or be sued shall be determined by the law of his domicile. Since Almond was apparently domiciled in Virginia prior to his conviction for burglary, it is to the law of Virginia that the federal courts must look in determining Almond's capacity to sue. The Virginia statutes provide for the appointment of a committee for the property of a person convicted of a felony and sentenced to confinement for one year or more; they also provide for the appointment of a committee for such a person, whether a resident or nonresident of Virginia, who has no property or estate in Virginia. 7 Va. Code Ann. §§ 53-305 and 53-306 (1957 Repl. Vol.).[2] 7 Va. Code Ann. § 53-307 (1957 Repl. Vol.) next states that such a committee may sue

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2 The record does not appear to reflect Almond's exact sentence but the parties have all proceeded on the basis that it was for at least one year so as to make these statutes operative.

and be sued in respect to all claims or demands of every nature in favor of or against such a convicted person, and specifically that "(n) o action or suit on any such claim or demand shall be instituted by or against such convict after judgment of conviction, and while he is incarcerated." If applied literally, § 53-307 would, therefore, require the appointment of a committee for Almond in order to permit him to institute suit under § 1983.

It has not been determined by any court whether § 53-307 was intended to apply to suits instituted in a federal court in Virginia under § 1983; and it is unlikely, if not impossible, that the courts of the State of Virginia will ever be asked to pass upon the question.

The present Virginia statutes are the outgrowth of an earlier statute designed to alleviate the consequences of the common law rule which permitted one convicted of a felony to be sued but not to appear in court to defend his case. Merchant v. Shry, 116 Va. 437, 82 S.E. 106 (1914). In Merchant, the earlier statute was said to require a committee in all actions "respecting . . . such convict." 825 S.E. at 110. The reviser's note to § 53-307's identical predecessor, enacted in 1919 (to replace a similar 1887 provision), stated that it was the intention to codify the rule stated in Merchant. 7 Va. Code Ann. § 53-307, ed. note (1957 Repl. Vol.).

The rationale of the Virginia statute would not seem to involve any state interest that Rule 17(b) was designed to preserve. Virginia does not declare prisoners to be civilly dead; they can convey realty and execute contracts.

Haynes v. Peterson, 125 Va. 730, 100 S.E. 471 (1919). Their only incapacity was their inability to sue, and this was remedied by the statutes enacted for their benefit. Merchant v. Shry, supra. The statute, moreover, does not appear to make the appointment of a committee discretionary. The language is that a "committee shall be appointed for him." (emphasis added) § 53-306. Accord § 53-305; Merchant v. Shry, 82 S.E. at 110. To require the statute to be observed in the case of a suit under § 1983 would serve only to delay the assertion of federal rights and to frustrate them if the appointment of a committee and the institution of suit by the committee could not be accomplished before the bar of limitations was interposed.

Other courts have held that statutes rendering prisoners civiliter mortuus cannot affect their capacity to maintain a suit under § 1983 despite Rule 17(b). McCollum v. Mayfield, 130 F.S. 112 (N.D. Cal. 1955), aff'd. sub nom Weller v. Dickerson, 314 F.2d 598 (9 Cir. 1963), cert. den., 375 U.S. 845 (1963); Beyer v. Werner, 299 F.S. 967 (E.D.N.Y. 1969); Siegel v. Ragen, 88 F.S. 996 (N.D. Ill. 1949), aff'd., 180 F.2d 785 (7 Cir. 1950), cert. den., 339 U.S. 990 (1950), rehearing den., 340 U.S. 847 (1950). The district court thought these cases distinguishable, since they concerned statutes making suit by a convict totally impossible; but in McCollum, we observe that the California statute allowed the Adult Authority discretion to restore a prisoner's right which it had not done in that case. 130 F.S. at 115-16. We, therefore, think that this distinction between the Virginia and the California statutes is tenuous and insubstantial. It seems to us that McCollum,

Beyer and Siegel were looking more to the relationship between Rule 17(b) and § 1983 than to the function of the applicable state statute.

While in McCollum, Beyer and Siegel, the total incapacity to sue of the one incarcerated may have led those courts to conclude that for vindication of a right under § 1983 which has been denied one need only be a person within the literal meaning of § 1983, plaintiff's situation may be even more aggravated. By the Virginia statutes, only his right to sue in an individual capacity is suspended. But, as has been noted, this may result in complete deprivation of his rights if a committee is not appointed promptly. Moreover, if a committee does not institute the suit promptly, the prisoner's rights may be lost since the Virginia statute of limitations is not tolled during the period of incarceration, as it is in many states treating a prisoner as incapable of maintaining litigation. Compare 2 Va. Code Ann. § 8-30 (1957 Repl. Vol.)(limitations suspended for infants and insane persons only) with Ill. Ann. Stat. ch. 83 § 22 (1966) and Cal. Code Civ. P. § 352 (West 1954)(limitations suspended for prisoners).

We, therefore, conclude that for purposes of suits under § 1983, the language of § 1983, affording the right to sue to "any citizen of the United States . . . within the jurisdiction thereof," who has been deprived of any right, privilege or immunity, should prevail over the conflicting policy purportedly expressed in Rule 17(b) when applied in the light of the rationale of Virginia statutes. Indeed, this is the result we reached in Sewell v. Pegelow, 291 F.2d 196, 198 (4 Cir. 1963), citing Siegel with approval, although the Virginia committee statute was neither pressed nor considered.

See also, Brown v. Peyton, 437 F.2d 1228, 1230, 1233 (4 Cir. 1971); Abernathy v. Cunningham, 393 F.2d 775 (4 Cir. 1968).

- II -

Congress has not enacted a statute of limitations applicable to suits arising under § 1983. In such circumstances federal courts follow the limitations period fixed by the law of the State in which the district court is held. O'Sullivan v. Felix, 233 U.S. 318 (1914). Unlike some other states, Virginia has not enacted a statute of limitations which is specifically made applicable to § 1983 suits.[3] We must, therefore, grapple with the Virginia general statute of limitations, 2 Va. Code Ann. § 8-24 (1957 Repl. Vol.), which the parties agree is the one to be applied. It reads:

> Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall

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3. See, for example, the reference to the Colorado statute in Salazar v. Doud, 256 F.S. 220 (D. Col. 1966). Because of the rising tide of § 1983 suits against state officials and the difficulty of applying a statute enacted primarily to deal with different types of litigation, Virginia may well wish to consider the enactment of a similar statute.

> be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued . . ..

The district court, after considering the statute and the case law construing it, held that the one-year period of limitations applied to all aspects of Almond's claims. In this appeal, no party seriously urges the correctness of this result. Almond suggests that his claim should be fragmented with the two-year period (beating and other personal injuries) and the five-year period (all other alleged cause of action, if any) each applying in part. Gaunce, Davis and Brown concede that to the extent the complaint claims damages for personal injury, the two-year period applies, Greeson v. Sherman, 265 F.S. 340 (W.D. Va. 1967), but they argue that the five-year period is inapplicable, Westover Court Corporation v. Eley, 185 Va. 718, 40 S.E.2d 177 (1946), and that strong public policy dictates resort to the one-year period. Kent, because he is unaffected, takes no position.

We agree that, to the extent that Almond's § 1983 complaint alleges a violation of his constitutional rights resulting in personal injuries of the type that would be actionable at common law, the Virginia two-year period unquestionably applies. But this is so, not because there was a right of recovery at common law but

because there was a violation of a constitutional right not to be beaten. We think it follows that the Virginia two-year period applies to all other rights which may be redressed under § 1983 by the recovery of money damages. Section 1983 creates a federal cause of action, unknown at common law, "for the deprivation of any rights, privileges or immunities secured by the Constitution and laws (of the United States) . . . ." This right of recovery depends upon federal considerations, and it is not one which is concerned with the archaic concepts of survivability of the common law. Barnes Coal Corp. v. Retail Coal Merchants Assn., 128 F.2d 645 (4 Cir. 1942). See also, Brazier v. Cherry, 293 F.2d 401 (5 Cir. 1961), cert. den., 368 U.S. 921 (1961); Pritchard v. Smith, 289 F.2d 153 (8 Cir. 1961). In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from "personal injuries." Under Virginia law, it is the object of litigation which determines the applicability of a statute of limitations not the form in which suit is instituted. Birmingham v. Chesapeake & Ohio Railway Co., 98 Va. 548, 37 S.E. 17 (1900); Friedman v. Peoples Service Drug Stores, 208 Va. 700, 160 S.E.2d 563 (1968). See also, Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969). Hence, our conclusion that the Virginia two-year period of limitations, applying to "every action for personal injuries" (emphasis added), applies generally to § 1983 suits.

Even if we conclude that a § 1983 action is

not a suit for "personal injuries" within the Virginia concept of that type of litigation, it is "more serious than a violation of a state right . . . even though the same act constitutes both a state tort and the deprivation of a constitutional right." Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). Accordingly, we think that it more properly belongs at the two-year step in Virginia's statute of limitations scale of values. It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five-year period. See Dinges v. Hannah, 185 Va. 718, 40 S.E.2d 177 (1946).

- III -

We agree with the district court that with respect to his shoes and the amount of bail which was set, Almond alleged no cause of action under § 1983. The former would appear frivolous, and, with regard to the latter, there is no allegation that Sheriff Kent, or any other defendant, played any part in setting bail.

We do not agree that the allegations as to being placed in "isolation" necessarily failed to state a cause of action as to Sheriff Kent. It is not inconceivable, when we read a pro se pleading with the liberality to which it is entitled, that the "isolation" may have been so unreasonably harsh as to amount to cruel and inhuman punishment, and in that event, a cause of action under § 1983 would have been alleged.

But even if the allegations of the complaint are read not to allege a cause of action against

Sheriff Kent, the case must be remanded for determination on the merits as to Gaunce, Davis and Brown. As to them, "judicial time would be conserved by a sharpening of the allegations and a refinement of the legal theory or theories under which plaintiff proceeds," Hayes v. Secretary of Department of Public Safety, _____F. 2d _____ (4 Cir., No. 71-1325, January 5, 1972). Accordingly, counsel should be appointed to represent plaintiff and an amended complaint should be required to be filed within a reasonable time before a responsive pleading is required. Leave to amend should include the right to amend as to Sheriff Kent if counsel determines that responsibly a cause of action can be alleged against him.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1234

JESSE L. ALLEN and
CONSTANCE G. ALLEN, Appellants

-v-

LEE A. GIFFORD and
CHARLES R. SAMUELS, Appellees.

(Argued June 6, 1972. Decided June 21, 1972

Before BUTZNER, RUSSELL, and FIELD,
Circuit Judges.

PER CURIAM:

Jesse L. Allen and Constance G. Allen appeal from an order of the district court which held that their complaint charging racial discrimination in the sale of real estate in violation of 42 U.S.C. § 1982 was barred by Virginia's one-year statute of limitations. The complaint, which seeks compensatory and punitive damages, alleges that the Allens suffered humiliation, emotional stress, and anxiety when the defendants initially refused to sell them a house. Later the Allens succeeded in purchasing a home in the subdivision the defendants were developing.

While this appeal was pending, we held, in Almond v. Kent, _____ F.2d _____, No. 71-1160 (4th Cir., April 10, 1972), that the state's two-year statute applies to actions brought under 42 U.S.C. § 1983 for personal injuries. Both § 1982 and § 1983 were enacted to redress the infringement of civil rights. Both allow the recovery of damages for personal wrongs. We conclude, therefore, that the reasons stated in Almond for applying Virginia's two-year statute of limitations to actions under § 1983 make the same limitation period appropriate for personal injury suits based on § 1982.

Accordingly, the judgment of the district court is vacated, and this case is remanded for further proceedings. Each party shall bear his own costs.

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 72-1234.

Jesse L. Allen and
Constance G. Allen,

Appellants,

vs.

Lee A. Gifford and
Charles R. Samuels,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; and the case is remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of this Court filed herewith. Each party shall bear his own costs.

/s/ Samuel W. Phillips
Entered: June 21, 1972 Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1234

Jesse L. Allen and
Constance G. Allen, Appellants,

versus

Lee A. Gifford and
Charles R. Samuels,

Appellees.

- - - - -

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

- - - - -

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court as prescribed by law within sixty (60) days or on or before August 20, 1972.

For the Court - By Direction.

/s/ Samuel W. Phillips
CLERK

Filed: July 6, 1972

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-78

LEE A. GIFFORD and CHARLES R. SAMUELS
Petitioners,

v.

JESSE L. ALLEN and CONSTANCE G. ALLEN
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents are in agreement with petitioners's statement of the case, however, respondents believe the issues are improperly stated. The issues raised before the Court of Appeals below are the best statement of the controversy brought before the Court. Very simply the only real issue in this case is:

ISSUE

Whether a cause of action under the Civil Rights Act of 1866 for damages arising out of alleged racial discrimination in the sale of real estate is governed by the Virginia two-year period of limitations for "every action for personal injuries" under Section 8-24, Code of Virginia, 1950 (1957 Repl. Vol.), or by the one-year period under the same section for personal actions "for which no limitation is otherwise prescribed" which do not survive at common law.

REASONS FOR NOT GRANTING THE PETITION

I. There is no conflict between the decision below and decisions of the other Circuit Courts of Appeals.

The question decided by the Fourth Circuit Court of Appeals below was whether the two-year Virginia

Statute of Limitations for "personal injuries", §8-24 Code of Virginia, 1950 (1957 Repl. Vol.), applied to a cause of action for racial discrimination in the sale of real estate arising under §1982 of Title 42, U.S.C. The Court of Appeals in a per curiam opinion, following its previous ruling in Almond v. Kent, F. 2d (1972), both of which are reprinted in petitioner's appendix, held that Virginia's two-year statute of limitations applied to civil rights actions under §1982 rather than the one-year period which applied to torts of a transitory nature not surviving under common law. The Virginia Statute does not make specific provision for civil rights actions and there is no general catch-all statute as in some states; the Virginia scheme appears to be designed to cover all possible common law actions.

Petitioners argue that the relief sought, compensatory and punitive damages for humiliation and embarrassment, as distinguished from the cause of action--deprivation of civil rights, has not been held to survive under Virginia law and that, consequently, respondents' cause of action was barred by the one-year period. This position is untenable.

It is not the relief sought that determines the period of limitations, but the nature of the cause of action: not the form in which the suit is instituted, but the object of litigation, Almond v. Kent, supra, A.13. Griggs v. Farmer, 430 F. 2d 638 (4th Cir. 1970), cited by petitioners in support of their position has no application to the question at bar because that case dealt with common law causes of action clearly encompassed by Virginia's Statutory scheme.

The issue is not whether a civil rights action would survive at common law as petitioners' urge, because indeed civil rights actions are not common law actions, or whether suits for punitive damages are governed by the one-year period, but what is the appropriate period of limitations for a cause of action for which several remedies may be fashioned by a federal court. See Lazard v. Boeing Company, 322 F. Supp. 343, 346, (E.D.La. 1971), where the defendants had urged that plaintiff's action under the 1866 Civil Rights Act was for tort or back wages which would require application of Louisiana's one-year prescriptive period and the Court said:

> Considering the breadth of the remedy available under §1981, it would be erroneous to characterize the action as merely one for tort or back wages . . . In reality this cause of action is one for discrimination, the cure

for which, as stated above, may be any one of a number of remedies.

The Louisiana District Court cited this Court's decision in Sullivan v. Little Hunting Park, 396 U.S. 229, 239, 90 S. Ct. 400, 405, 24 L. Ed. 2d 386, where the Court said "[T]he existence of a statutory right implies the existence of all necessary and appropriate remedies."

Other circuit courts have followed similar approaches to their separate problems of applying state statutes of limitations to civil rights actions. In both Waters v. Wisconsin Steel Wks. of International Harvester Co., 427 F. 2d 476 (7th Cir. 1970), and Baker v. F & F Investment, 420 F. 2d 1191 (7th Cir. 1970), for example, certain specific periods of limitations under Illinois law were rejected and the Court applied the state's five-year period for civil

rights actions not otherwise provided for. See also Donovan v. Reinbold, 433 F. 2d 738 (9th Cir. 1970).

The Virginia Statutory scheme contemplated that personal actions other than actions for personal injuries would be divided into two categories, those surviving and those not. A civil rights action simply cannot be forced into this formula. The logical and consistent approach is to apply the two-year period generally as the Court below did, considering the ambiguity of the Virginia Statute and the importance of the federally created right. The resolution of the question of the application of Virginia's Statute of Limitation is consistent with sound principles of federal law.

II. The decision below is not inconsistent with prior decisions of this Court.

Petitioners' cite Iron Gate Bank v. Brady, 184 U.S. 665, 22 S. Ct. 529, 46 L. Ed. 739, in support of their petition. That case construed Virginia law and held that a cause of action for malicious and wanton conduct in serving a distress warrant did not survive either under common law or statutes of Virginia. That case has no application to the issue raised at bar. It did not deal with civil rights and its reasoning does not apply to a civil rights action which is not dependent upon state law conceptions of survivability of actions. Respondent is unaware of any prior decision of this Court setting forth either principle or precedent inconsistent with the decision below. To the contrary, the decision below is in harmony with the well established rule

requiring federal courts to apply the limitations period fixed by the law of the state in which the action arises. O'Sullivan v. Felix, 233 U.S. 318 (1914) Since Virginia has no statute which is specifically made applicable to civil rights actions, it is necessary to apply and construe the Virginia general statute which the parties agree is the one to be applied. The dispute is narrowly drawn over the proper application of §8-24, Code of Virginia, 1950 (1957 Repl. Vol.).

The Court below, considering the difficulty in fitting a civil rights action into Virginia's statute in Almond v. Kent, supra, A. 13, said that "[i]n the broad sense, every cause of action under §1983 which is well-founded results from 'personal injuries'". The Court concluded that Virginia's two-year period applying to "every action for personal injuries" (emphasis added) applies

generally to §1983 suits. In this case below the same application was made to §1982 suits. Alternatively, in Almond v. Kent, supra, A. 14, the Fourth Circuit said that a civil rights action was more important than the transitory torts falling under the one-year period of limitations and therefore more properly belonged at the "two-year step in Virginia's statute of limitations scale of values".

III. There are no constitutional questions or broad policy issues involved.

There is no constitutional issue raised nor are there any issues of broad application involved in this case. The question is limited to a narrow application of Virginia's statute of limitations to a federal cause of action under a long established borrowing principle. Federal courts, although they must apply the

state statute are not required to abandoned the remedial purposes of the Civil Rights Act, or to force civil rights actions into a state scheme of limitations that obviously did not contemplate such actions or purport to prescribe specific provisions for such contingencies.

CONCLUSION

For the reasons set out above the Petition should not be granted.

Respectfully
submitted,

/s/ Stanley E. Sacks

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CERTIFICATE OF SERVICE

I, the undersigned, attorney for the respondents, do hereby certify that I have served three copies of this Brief in Opposition to the Granting of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on each other party separately represented in this proceeding by deposition the same in the United States mail, with first class postage prepaid, addressed to each counsel of record, at his Post Office address:

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All parties required to be served have been served this 10th day of August, 1972.

By Stanley E. Sacks
Stanley E. Sacks, Counsel for
Jesse L. Allen & Constance G.
Allen